

On July 19, 2011 appellant, then a 25-year-old program support assistant, filed an occupational disease claim alleging that on April 8, 2010 she developed left shoulder pain and

carpal tunnel syndrome due to repetitive duties of opening doors and sitting and standing in the performance of duty.

In a letter dated July 21, 2011, OWCP requested additional factual and medical evidence from appellant in support of her occupational disease claim. Appellant submitted a narrative statement dated August 5, 2011, describing her duties as a secretary to which she attributed her left shoulder condition. On April 12, 2010 appellant initially sought treatment from Dr. Michael P. Pavalack, a chiropractor, for chronic mid-back pain. She provided a shoulder x-ray dated February 23, 2011 which was interpreted as normal. On May 17, 2011 Dr. Ethel S. Rose, a Board-certified neurologist, noted appellant's history of repetitively opening and closing a locked door. She reviewed nerve conduction studies and diagnosed left median nerve entrapment at the wrist or mild-to-moderate carpal tunnel syndrome. Dr. James Ramsey, a Board-certified orthopedic surgeon, examined appellant on July 12 and 19, 2011. He noted her history of left shoulder pain and diagnosed supraspinatus tendinitis.

By decision dated September 12, 2011, OWCP denied appellant's claim finding that she failed to submit sufficient medical evidence to establish a causal relationship between her diagnosed conditions and her work duties.

On November 19, 2012 appellant requested reconsideration and submitted medical evidence. She underwent a left shoulder magnetic resonance imaging (MRI) scan on July 18, 2011. Appellant was examined by a licensed practical nurse on September 28, 2011 who submitted form reports dated April 5 and July 13, 2012 diagnosing left shoulder pain. Dr. Carroll M. McLeod, a Board-certified anesthesiologist, examined appellant on May 4, 2012 for neck, left shoulder and left periscapular pain probably due to degenerative cervical disc disease. He performed a C6-7 interlaminar cervical epidural steroid injection on May 11, 2012. On July 3, 2012 Dr. Eric Amundson, a Board-certified neurologist, examined appellant for left-sided neck, scapular and arm pain. Dr. Angela L. Chandler, a Board-certified neurologist, completed treatment notes on July 10 and October 17, 2012 diagnosing paresthesias, numbness and shoulder pain. Dr. Scott A. Davis, a Board-certified family practitioner, completed treatment notes on May 10 and August 30, 2012 diagnosing neck and shoulder pain and hypothyroidism.

On October 3, 2011 Dr. Rowland M. Roberson, a Board-certified orthopedic surgeon, diagnosed left shoulder pain. Appellant also submitted cervical MRI scans dated October 7 and 11, 2011. Dr. Nathaniel O. Lawson, a Board-certified neurologist, stated that she was totally disabled on October 17, 2012. On September 7, October 22 and November 12, 2012 Dr. Richard M. O'Keeffe, Jr., an orthopedic surgeon, examined appellant due to left shoulder pain. He noted that an MRI scan of November 5, 2012 demonstrated an anterior supraspinatus tear without cuff retraction. Dr. O'Keeffe recommended left shoulder surgery.

By decision dated December 5, 2012, OWCP declined to reopen appellant's claim for consideration of merits finding that her reconsideration request was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

Under section 8128(a) of FECA,¹ OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 10.607 provides that “An application for reconsideration must be sent within one year of the date of [OWCP’s] decision for which review is sought.”² In *Leon D. Faidley, Jr.*,³ the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration. OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant’s case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates “clear evidence of error” on the part of OWCP.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607.

³ 41 ECAB 104, 111 (1989).

⁴ 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁵ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁷ See *Jesus D. Sanchez*, *supra* note 4.

⁸ See *Leona N. Travis*, *supra* note 6.

⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

fundamental question as to the correctness of OWCP's decision.¹⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹¹

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated December 5, 2012 in which it declined to reopen appellant's case on the merits because the request was not timely filed and did not show clear evidence of error. Since more than 180 days elapsed from the date of issuance of OWCP's September 12, 2011 merit decision to the date of the filing of appellant's appeal, on January 18, 2013, the Board lacks jurisdiction to review that decision.¹²

The Board finds that the December 5, 2012 refusal of OWCP to reopen appellant's claim for further consideration on the merits of the claim under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error was proper and did not constitute abuse of discretion.

OWCP initially denied appellant's claim on September 12, 2011 on the grounds that she failed to submit the necessary medical opinion evidence establishing a causal relationship between her diagnosed conditions and her implicated employment duties. In support of her request for reconsideration, appellant submitted several medical reports addressing her cervical and left shoulder conditions. The Board has independently reviewed these medical reports and finds that the evidence submitted does not correct the original defect in her claim, that lack of medical opinion evidence on causal relationship. The medical reports submitted do not contain a history of injury or any opinion addressing the cause of appellant's current conditions. Due to these defects, the medical reports are not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of OWCP's decision.

CONCLUSION

The Board finds that appellant did not submit sufficiently detailed and well reasoned to raise a fundamental question as to the correctness of OWCP's September 12, 2011 decision and did not establish clear evidence of error on the part of OWCP.

¹⁰ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹¹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

¹² *See* 20 C.F.R. § 501.3(e).

ORDER

IT IS HEREBY ORDERED THAT December 5, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board